Office - Supreme Court, U. S.
FILED
MAY 1 1943
CHARLES ELMORE CROPLEY
CLERK

(11)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 983

JOHN M. WHELAN & SONS, INC. (CLAIMANT),
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

GEORGE E. BEECHWOOD,
ROBERT G. KELLY,
CONLEN, LABRUM & BEECHWOOD,
Counsel for Petitioner.

Index for Writ of Certiorari

	Page
Question involved	1
Jurisdiction	2
Statement of the case	2
Reasons for granting petition	4
Prayer for writ of certiorari	4
Certification	5

Index to Brief in Support of Writ.

Opinions of the court below	6
Jurisdiction of the court	6
Facts	6
Specifications of error	6
Argument	7
A. When the contracting officer terminated petitioner's right to proceed under the contract, the Government waived its right to damages for delay	7
B. If the Government, by terminating the contractor's right to proceed, did not waive its right to damages for delay, then the provision calling for an agreed stipulated sum of damages for delay is binding	11
Conclusion	12

Table of Cases Cited.

Fidelity & Casualty Company of New York v. *U. S.*, 81 Court of Claims 495	7, 10
Commercial Casualty Company v. *U. S.*, 83 Court of Claims 367	7, 10
American Employer's Insurance Company of Boston v. *U. S.*, 91 Court of Claims 231	7, 10
Fidelity & Deposit Company of Maryland v. *Robertson*, 136 Ala. 379 (1902)	7, 10
Andrew A. Moore, et al., v. *Board of Regents for the Norman School in District Number Two*, 215 Mo. 705	7, 10

Page

Thomas Gillen v. *John L. Hubbard*, impleaded with Garrett Van Cleve and George Ryerson, 2 Hilton's Reports 303 (1859, N. Y.) 7, 10

John Murphy, et al v. *Louis Buckman*, 66 N. Y. 297 (1876) 7, 10

Philip Brady v. *The Mayor*, Aldermen and Commonalty of the City of New York, 44 Hun 511 (1887, N. Y.). 7, 11

Robinson, Adminstrator of Robinson v. *U. S.*, 261 U. S. 486 ..... 7, 11

TABLE OF STATUTES CITED.

Act of February 13, 1925, C. 229, § 3, 43 Stat. 939 (Judicial Code (28 U. S. C. A., § 288(b)) 2, 6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 983

JOHN M. WHELAN & SONS, INC. (CLAIMANT),
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of John M. Whelan & Sons, Inc., respectfully represents:

This is a petition for writ of certiorari to the Court of Claims of the United States of America to review the judgment of that court entered on the 5th day of October, 1942 (R. 91), and the subsequent order entered on February 1, 1943 (R. 92).

Question Involved.

Where the contractor is declared in default and its right to proceed with the work is terminated, is the Federal government entitled to recover, in addition to the excess cost

of completing the work, liquidated damages for delay and rental values of officers' quarters, measured by proportionate salaries and rental allowances normally allowed officers as compensation, under Standard Damage Clause of Federal government contract, which provides:

> (1) The government may terminate the contractor's right to proceed, take over the work, and prosecute the same to completion by contract or otherwise, and hold the contractor and its sureties liable for any excess cost occasioned the government thereby,

but

> (2) If the government does not terminate the contractor's right to proceed, and the contractor shall continue the work, it and its sureties shall be liable for liquidated damages for each day beyond the time specified in the contract required to complete the work?

Answered by the United States Court of Claims in the affirmative.

Jurisdiction.

This Court has jurisdiction to consider and grant this petition pursuant to Chapter 229, Section 3, of the Act of February 13, 1925, 43 Stat. 939, Judicial Code (28 U. S. C. A., § 288 (b)).

Statement of the Case.

On or about December 4, 1933, the petitioner, through its authorized agent, and the United States government, through its duly authorized agent, the War Department, entered into a written contract wherein petitioner agreed to furnish labor and material and to perform all work required in the erection of seven officers' quarters at Fort Monmouth, New Jersey, the work to be commenced on December 28th, and completed on or before August 5, 1934.

By extensions duly made by the Federal government the time within which to complete the work by the petitioner was extended until November 30, 1934.

On December 10, 1934, the contracting officer, pursuant to authority of Article 9 of the contract (Exhibit "A", R. 25), wrote the petitioner terminating its right to proceed with completion of the work as of December 4, 1934. This letter was written during a controversy between the parties respecting the interpretation and application of certain provisions of the contract (Findings 3, 4, 5 and 6; R. 58-64, inclusive).

On April 12, 1935 the Federal government relet a contract for completion of the work, in accordance with Article 9 of the contract entered into between petitioner and the government (Finding 6; R. 64).

Under the contract which the Federal government relet there was an excess cost in completing the work of $8,860.93 (Finding 8; R. 66).

The last building was completed and accepted on September 12, 1935 (Finding 6; R. 64).

Your petitioner, for the reasons set forth in the petition filed with the Court of Claims, asked for a recovery against the United States in the total sum of $38,045.70 (R. 1-52, inc.). A general traverse was filed by the United States (R. 52), and it also filed a counter-claim for the sum of $21,747.84 (R. 52-54). The case came on for hearing and the Court of Claims dismissed the petition of the claimant and entered judgment for the United States in the sum of $22,525.56, based on the conclusion of law that the government was entitled, under its contract, to recover not only excess cost of completion, but liquidated damages in the amount of $100.00 for four days' delay, and, in addition thereto, for various items which the government might have saved in allowing officers in their compensation the rental

values of the quarters and proportional cost of the salaries totalling $13,501.00 (R. 65-66).

Reasons for Granting Petition.

(1) The Court of Claims erred in ignoring the plain wording of Article 9 of the contract in question.

(2) The Court of Claims erred in failing to follow its own decisions and those of other courts in interpreting and applying similar provisions of contracts, which interpretation and application public contractors had a right to and did rely upon.

(3) This matter is of vast public importance because most all of the present contracts pertaining to the production of war material contain this identical provision.

(4) It is of paramount public importance that long established decisions interpreting and applying the meaning of provisions of Federal government contracts be not disturbed, and that there remain a uniformity of such interpretation and application of such provisions among all citizens of the United States.

(5) The Court of Claims erred in its decision.

Prayer for Writ of Certiorari.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Court of Claims of the United States commanding said court to certify and send to this Court on a day certain, to be thereafter designated, a full and complete transcript of the record of the proceedings in said Court entitled "*John M. Whelan & Sons, Inc., Claimant* v. *The United States of America,* number 44022," to the end that the said case may be reviewed and determined by this Court; that petitioner may have such relief as this

Court may deem proper, and that the judgment and order of the said Court of Claims of the United States may be reversed by this Honorable Court.

JOHN M. WHELAN & SONS, INC.,
By GEORGE E. BEECHWOOD,
ROBERT G. KELLY,
Attorneys for Petitioner.

Certification.

I hereby certify that I am a member of the Bar of the Supreme Court of the United States; that I am counsel for John M. Whelan & Sons, Inc., the petitioner; that the foregoing petition has been prepared in accordance with the request of the petitioner; that the allegations in said petition are true to the best of my knowledge, information and belief; that said petition is not made for the purpose of delay or prolongation of litigation, and is in my opinion well-founded in law and in fact, and should be granted.

GEORGE E. BEECHWOOD.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Court Below.

The findings of fact and conclusions of law and the opinion of the Court of Claims of the United States were filed on October 5, 1942 R. 55-91, inclusive).

An order denying claimant's motion for new trial was filed on February 1, 1943 (R. 92).

Jurisdiction of the Court.

The jurisdiction of this Court is invoked under Chapter 229, Section 3, of the Act of February 13, 1925, 43 Stat. 939, Judicial Code (28 U. S. C. A., § 288 (b)). The final order of the Court of Claims of the United States was filed on February 1, 1943. The petition for writ of certiorari was filed on May 1, 1943.

Facts.

The facts are stated in petition ante, page three to four. The fact is emphasized that the Court of Claims awarded not only the actual cost of completing the buildings, but in addition thereto liquidated damages and other damages, and also awarded a sum in excess of that demanded by the Comptroller General.

Specifications of Error.

1. The Court of Claims of the United States, in adjudging the United States of America recover from the petitioner the sum of $22,525.56, erred in including in that sum the amount of $13,601.00, made up of items of $100.00 liquidated damages, and $13,501.00 for rental values and proportional cost of salaries of officers.

2. The Court of Claims erred in failing to follow its previous decisions in the cases of *Fidelity & Casualty Company of New York* v. *U. S.*, 81 Court of Claims 495; *Commercial Casualty Company* v. *U. S.*, 83 Court of Claims 367; *American Employer's Insurance Company of Boston* v. *U. S.*, 91 Court of Claims 231, and the decisions in *Fidelity & Deposit Company of Maryland* v. *Robertson*, 136 Ala. 379 (1902); *Andrew A. Moore et al.* v. *Board of Regents for the Normal School in District Number Two*, 215 Mo. 705 (1909); *Thomas Gillen* v. *John L. Hubbard, impleaded with Garrett Van Cleve and George Ryerson*, 2 Hilton's Reports 303 (1859, N. Y.); *John Murphy et al* v. *Louis Buckman*, 66 N. Y. 297 (1876); and *Philip Brady* v. *The Mayor, Aldermen and Commonalty of the City of New York*, 44 Hun. 511 (1887, N. Y.).

3. The Court of Claims erred in failing to follow the decision of the Supreme Court of the United States in the matter of *Robinson, Administrator of Robinson* v. *U. S.*, 261 U. S. 486.

4. The Court of Claims erred in entering its judgment of October 5, 1942.

5. The Court of Claims erred in entering its order of February 1, 1943, overruling the petitioner's motion for a new trial.

Argument.

A. *When the Contracting Officer Terminated Petitioner's Right to Proceed Under the Contract, the Government Waived Its Right to Damages for Delay.*

The contract between the petitioner and the government anticipated and made provision for the following contingencies:

> "If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such dili-

gence as will insure its completion within the time specified in Article I, or any extension thereof, or fails to complete said work within such time * * *" (Article 9 of the contract, R. 25).

The time for completion, including the extended days, was November 30, 1934. On November 30, 1934, the contractor had not completed the work and, therefore, the last-mentioned of the above contingencies had arisen. In the event of the occurrence of any such contingency the contract provided that:

> "* * * the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there had been a delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise. * * *"

On December 10, 1934, the contractor received from the government notice of the termination of its right to proceed (R. 62). The government thereupon took over the work completed on September 12, 1935 (R. 64).

The circumstances then are these: The contractor failed to complete the work within the time specified and the government, in accordance with the terms of the contract, terminated the contractor's right to proceed, took over the work, and the same was prosecuted to completion.

What liability does the contract impose on the contractor for the contractor's failure?

> "* * * the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby." (Article 9; R. 25-26.)

So far the contract has made no mention of liquidated damages or damages. Liquidated damages is the subject of a succeeding provision of Article 9:

"* * * If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof. * * *."

The amount of the liquidated damages in the accompanying papers found in defendant's Exhibit 5, page 47, reads as follows:

"*Liquidated Damages.*—If the Contractor delays the completion of the work under this contract beyond the time for completion stated in the contract, then the Contractor shall pay the U. S. as fixed, agreed and liquidated damages the amount of Twenty-five dollars ($25.00) for each calendar day of delay until the work is completed or accepted, subject to the provisions of Article 9 of Government Form No. P. W. A. 51.

"If one or more buildings are accepted in advance of the whole, the total amount of liquidated damages collected under this contract will be decreased in the amount of Two Dollars and fifty Cents ($2.50) per day for each single officers' quarters and five ($5.00) dollars per day for each double company officers' quarters accepted."

It is at once apparent that the provision for damages for delay was waived by the government when it elected to terminate the contractor's right to proceed, and hence has no application to the instant case. The contractor's right to proceed with the work was terminated. The notice received by the contractor on December 10, 1934, could not have been more unequivocal:

"You are hereby informed that you are declared in default as of December 4, 1934, and your right to pro-

ceed with the work under the above-described contract is hereby terminated in accordance with the terms of said contract.

"A copy of this notice of default is being furnished to the surety on your performance bond (Fireman's Fund Indemnity Co.) and the surety will be given an opportunity to step in and complete the job. If the surety should not so elect, the United States will complete the work, and will look to you and your surety to make good any increased cost incurred by the Government."

Consequently, all of the provisions of the contract, including that for damages, contingent upon the government not terminating the contractor's right to proceed, were instantly rendered ineffectual and the liquidated damages awarded by the Court of Claims founded on such a provision was error. With this construction the authorities are in complete accord. See:

Fidelity & Casualty Company of New York v. *U. S.*, 81 Court of Claims 495;

Commercial Casualty Company v. *U. S.*, 83 Court of Claims 367;

American Employer's Insurance Company of Boston v. *U. S.*, 91 Court of Claims 231;

Fidelity & Deposit Company of Maryland v. *Robertson*, 136 Ala. 379 (1902);

Andrew A. Moore et al. v. *Board of Regents for the Normal School in District Number Two*, 215 Mo. 705 (1909);

Thomas Gillen v. *John L. Hubbard, impleaded with Garrett Van Cleve and George Ryerson*, 2 Hilton's Reports 303 (1859, N. Y.);

John Murphy et al. v. *Louis Buckman*, 66 N. Y. 297 (1876);

Philip Brady v. *The Mayor, Aldermen and Commonalty of the City of New York*, 44 Hun 511 (1887, N. Y.);
Robinson, Administrator of Robinson v. *U. S.*, 261 U. S. 486.

B. *If the Government, by Terminating the Contractor's Right to Proceed, Did Not Waive Its Right to Damages for Delay, Then the Provision Calling for an Agreed Stipulated Sum of Damages for Delay Is Binding.*

The provision for damages for delay reads:

> "Liquidated Damages. If the Contractor delays the completion of the work under this contract beyond the time for completion stated in the contract, then the Contractor shall pay the U. S. as fixed, agreed and liquidated damages the amount of Twenty-five dollars ($25.00) for each calendar day of delay until the work is completed or accepted, subject to the provisions of Article 9 of Government Form No. P. W. A. 51.
>
> "If one or more buildings are accepted in advance of the whole, the total amount of liquidated damages collected under this contract will be decreased in the amount of Two Dollars and fifty Cents ($2.50) per day for each single officers' quarters and five ($5.00) dollars per day for each double company officers' quarters accepted."

This provision calls for the payment of damages for delay at the rate of $25.00 per day for each calendar day, and it also calls for an allowance for the buildings as they are completed.

There is no finding by the Court of Claims justifying the delay of the government of over 130 days (from December 10, 1934, to April 12, 1935) in reletting the contract, and for which delay damages were awarded against petitioner at the rate of nearly $50.00 a day.

The award made by the Court of Claims is equivalent to approximately $50.00 per day in total disregard of the provisions for damages at $25.00 per day. It is submitted that the Court of Claims erred in not following the decision of the United States Supreme Court in the case of *Robinson, Administrator of Robinson* v. *U. S., supra,* where the Court enforced such a provision in a contract with the United States government.

Conclusion.

It is submitted, therefore, that this Court should allow the petition and order the writ of certiorari to issue to the Court of Claims of the United States.

Very respectfully submitted,

GEORGE E. BEECHWOOD,
ROBERT G. KELLY,
CONLEN, LABRUM & BEECHWOOD,
Attorneys for Petitioner.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Contract provision involved	2
Question presented	3
Statement	3
Argument	5
Conclusion	10

CITATIONS

Cases:

American Employer's Ins. Co. of Boston v. *United States*, 91 C. Cls. 231 — 10

Collins v. *United States*, 93 C. Cls. 369 — 8

Commercial Casualty Ins. Co. v. *United States*, 83 C. Cls. 367 — 10

Continental Casualty Co. v. *United States*, 113 F. (2d) 284, affirming 29 F. Supp. 598, certiorari denied, 311 U. S. 696 — 10

Fidelity & Casualty Co. v. *United States*, 81 C. Cls. 495 — 9, 10

Fidelity & Deposit Co. v. *Robertson*, 136 Ala. 379 — 9

Maryland Casualty Co. v. *United States*, 93 C. Cls. 247 — 7, 10

Massachusetts Bonding & Ins. Co. v. *John R. Thompson Co.*, 88 F. (2d) 825, certiorari denied, 301 U. S. 707 — 8

Mazzolla v. *Bornstein*, 104 Conn. 430 — 7

Prudence Co., Inc. v. *Fidelity & Deposit Co.*, 297 U. S. 198 — 7, 8

Robinson v. *United States*, 261 U. S. 486 — 9

Six Companies of California v. *Joint Highway Dist. No. 13*, 110 F. (2d) 620, reversed on other grounds, 311 U. S. 180 — 9

Southern Pac. Co. v. *Globe Indemnity Co.*, 21 F. (2d) 288 — 10

Trainor Co. v. *Aetna Casualty Co.*, 290 U. S. 47 — 7

United States v. *Continental Casualty Co.*, 29 F. Supp. 598, affirmed, 113 F. (2d) 284, certiorari denied, 311 U. S. 696 — 7, 10

United States v. *Cunningham*, 125 F. (2d) 28 — 10

United States v. *Grogan*, 39 F. Supp. 819, 44 F. Supp. 871 — 10

Wise v. *United States*, 249 U. S. 361 — 9

Miscellaneous:

15 Comp. Gen. 409 — 10

532182—43——1

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 983

JOHN M. WHELAN & SONS, INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The special findings of fact, conclusion of law, and opinion of the Court of Claims (R. 55–91) and its order denying petitioner's motion for a new trial (R. 92) are not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on October 5, 1942 (R. 91; Pet. 1).[1] Peti-

[1] The transcript by a typographical error refers to the judgment as having been entered *December* 5, 1942.

tioner's motion for a new trial was overruled on February 1, 1943. The petition for a writ of certiorari was filed on May 1, 1943. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

CONTRACT PROVISION INVOLVED

Article 9 of the standard form Government contract here involved provides in relevant part that:

> *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. * * * If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the

> Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed the amount as set forth in the specifications or accompanying papers * * *. (R. 25–26.)

QUESTION PRESENTED

Whether, after terminating a contractor's right to proceed pursuant to Article 9 of a standard form Government contract subsequent to the date of completion fixed in the contract as extended, the Government is entitled, in addition to the extra cost of completing the work, to damages for delay and excess costs.

STATEMENT

Petitioner entered into a written contract with the United States for the construction of seven buildings for officers' quarters at Fort Monmouth, New Jersey, the work to be commenced on December 28, 1933, and completed on August 5, 1934, later extended until November 30, 1934 (F. 1, R. 57). The contract fixed liquidated damages in the amount of $25.00 a day for each calendar day of delay (R. 67).

Following a controversy between the parties as to the interpretation and application of certain labor provisions of the contract (F. 3, 4, R. 58–62), petitioner ceased all operations on November 12, and refused to resume work (F. 4, R. 61), abandoning the contract on December 3,

1934 (F. 5, R. 63). On December 10, 1934, the contracting officer, pursuant to the authority of Article 9 of the contract (R. 25–26), declared plaintiff in default as of December 4, 1934 (F. 4, R. 62).

The contracting officer advertised for proposals for the completion of the contract, bids were received, and on April 12, 1935, a contract for the completion of the work was entered into with Eastern Construction Company, Inc. (the "completion contractor"), in accordance with Article 9 of the original contract (F. 6, R. 64).

All work under the second contract was completed and accepted September 12, 1935 (F. 6, R. 64), the Government having proceeded with all reasonable and proper dispatch in completing the work (R. 90).

Petitioner brought suit in the Court of Claims to recover extra costs and damages from the United States, on account of allegedly wrongful termination of the contract and allegedly erroneous rulings of the Government's officers. The United States filed a general traverse (R. 52) and a counterclaim (R. 52–54) seeking recovery of the excess cost of completing the contract and the damages caused by petitioner's default and the consequent delayed completion of the work.

The court below held that petitioner was not entitled to recover any part of its claim, and dismissed its petition. That decision is not ques-

tioned in this proceeding. The court below further held that the Government was entitled to recover $22,525.56 on its amended counterclaim and entered judgment for the United States in that amount (R. 88).

ARGUMENT

Petitioner does not question that part of the judgment below which awards the United States $8,924.43, consisting principally of the excess cost of completion.[2] Petitioner assigns as error only the allowance to the United States of $13,601.00 (see Pet. 6) made up of:

(1) $9,340.40 as the proportional value of rental allowances to Army officers stationed at Fort Monmouth, N. J., between the date of petitioner's default (December 4, 1934) and the completion date of the work (September 12, 1935), incurred because of petitioner's failure to complete the contract in time;

(2) $4,160.73 as salaries to the Constructing Quartermaster and his employees for additional work performed by them during this period, by reason of petitioner's default; and

[2] The items not in dispute consist of: (1) $8,860.93, as the excess cost of completion (being the amount by which the partial payments made to petitioner and the payments made to the completion contractor exceeded petitioner's contract price) (R. 65, 66); (2) $15.50, as the cost of advertising for the completion contract; and (3) $48.00, as the cost of labor to protect materials at the site of the work between the date of petitioner's default and the date the completion contractor commenced work.

(3) $100 as damages accrued between the date fixed for completion (November 30) and the date of default (December 4)[3] (R. 67).

Petitioner argues that (1) by terminating petitioner's right to proceed under the contract, the Government waived its right to damages for delay in completion, and if it did not, then (2) the liquidated damages stipulated in the contract measure the right to recover (Pet. 7–12). There is no merit in either contention.

1. The questioned items are "excess costs" which Article 9 of the contract expressly stipulates shall be recovered in these circumstances. Article 9 provides that if the contractor fails to prosecute the work diligently or to complete it on time, the Government may terminate his right to proceed and may "prosecute the same to completion, by contract or otherwise." Petitioner concedes that the Government properly terminated the work pursuant to Article 9 and prosecuted it to completion on September 12, 1935 (Pet. 8). Article 9 further states that in such event "the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby" (see p. 2, *supra*). The term "thereby,"

[3] The $100 item was calculated upon the basis of the prescribed liquidated damages of $25 per day, but the court expressly found that item, not as liquidated damages, but as the actual damages sustained by the Government during this period, which were "at least equal to" $100 (R. 67).

reasonably interpreted, must refer to the contemplated train of events: i. e., the contractor's failure to prosecute or complete the work properly, the termination of his right to proceed by the Government, and the Government's taking over and prosecution of the work to completion. So construed, the term "excess cost," as applied to the items of recovery in this case, becomes synonymous with actual damage due to additional outlay. This construction finds support in several decisions holding that the costs of supervision during completion after the Government has terminated the contractor's right to proceed, are recoverable as "excess cost" under Article 9 (*United States* v. *Continental Casualty Co.*, 29 F. Supp. 598, 601 (E. D. La.), affirmed, 113 F. (2d) 284 (C. C. A. 5), certiorari denied, 311 U. S. 696; *Maryland Casualty Co.* v. *United States*, 93 C. Cls. 247). In the case at bar the court found that because of petitioner's default and the consequent delayed completion of the work, the Government had incurred costs totalling $13,601.13, composed of rental allowances for officers' quarters for the period between default and completion (during which quarters other than those to be available at the project had to be furnished to the officers),[4]

[4] A contractor on notice that a building is erected for a particular use is liable for the actual rental value as adapted to that use during the period of delay. *Prudence Co., Inc.* v. *Fidelity & Deposit Co.*, 297 U. S. 198, 206; *Trainor Co.* v. *Aetna Casualty Co.*, 290 U. S. 47; *Mazzotta* v. *Bornstein*, 104 Conn. 430, 133 Atl. 677.

salaries to supervising personnel for the additional work performed on account of the default, and damages apportioned for the four days between completion date and termination. These costs were in a real sense "excess costs" occasioned to the Government by the default and delayed completion. *Collins* v. *United States,* 93 C. Cls. 369, 384.

Even if the controverted items are deemed "actual damages for delay" rather than "excess costs"[5] under Article 9, nothing in the contract precludes their recovery. For breach of a construction contract by the builder's delay in completion of the contract, or by his abandonment of the work, necessitating its completion by others, the owner is entitled to actual damages incurred by him as a result of the delayed performance. *Prudence Co., Inc.* v. *Fidelity & Deposit Co.,* 297 U. S. 198, 206; *Massachusetts Bonding & Ins. Co.* v. *John R. Thompson Co.,* 88 F. (2d) 825 (C. C. A 8), certiorari denied, 301 U. S. 707. Petitioner apparently contends that this familiar principle is rendered inapplicable by the Government's termination of petitioner's right to proceed under Article 9 of the contract. But nothing in that provision evidences an intention on the part of the Government to relinquish the traditional and un-

[5] The court below lumped the recovery together as "excess cost of completion and the actual damages for delay," without differentiating sharply between items of cost and items of damage (*cf.* R. 67, 90).

questioned right to recover actual damage from a breach of contract. In the presence of a provision such as Article 9 the courts have found no difficulty in awarding actual damages to the owner, as the cases cited by petitioner itself will illustrate. *Fidelity & Casualty Co.* v. *United States,* 81 C. Cls. 495, 501–2; *Fidelity & Deposit Co.* v. *Robertson,* 136 Ala. 379, 34 So. 933, 944. Certainly damages for delay were very much within the contemplation of the parties, and the liquidated damage provision so attests (*cf. Robinson* v. *United States,* 261 U. S. 486; *Wise* v. *United States,* 249 U. S. 361, 366).

2. The liquidated damage provision in Article 9, which applies only where the Government permits the contractor to proceed after the time fixed for completion, cannot conceivably be read as a waiver of the owner's unquestioned right to actual damages from the contractor's outright refusal to complete the work. Such a stipulation is normally inserted to relieve the owner of the burden of proving the actual damages from delayed completion by a contractor (*cf. Wise* v. *United States, supra*); to give it any effect where the contractor defaults and does not complete the contract at all would reduce Article 9 to an abridgment of the Government's rights under general law instead of the enlargement which was patently intended. (*Cf. Six Companies of California* v. *Joint Highway Dist. No. 13,* 110 F. (2d) 620 (C. C. A. 9), reversed on other grounds, 311 U. S. 180.)

The contention advanced by petitioner, that if actual damages for delay are recoverable they must be limited to the liquidated damages of $25 per day stipulated in Article 9 (Pet. 11–12), ignores the clear language of Article 9, which imposes the liquidated damages only where the contractor is allowed to continue the work after default (see pp. 2–3, *supra*). Indeed, the court below has consistently construed that provision to preclude the recovery of liquidated damages where the Government terminates the contract for the contractor's default.[6]

CONCLUSION

The decision below is correct and is in accord with previous decisions of the court below and of this court. It is therefore respectfully submitted

[6] *Maryland Casualty Co.* v. *United States*, 93 C. Cls. 247; *American Employer's Ins. Co. of Boston* v. *United States*, 91 C. Cls. 231; *Commercial Casualty Ins. Co.* v. *United States*, 83 C. Cls. 367; *Fidelity & Casualty Co.* v. *United States*, 81 C. Cls. 495; see also *United States* v. *Cunningham*, 125 F. (2d) 28 (App. D. C.). We do not acquiesce in the view that termination *after* the date of completion has the effect of cancelling the liquidated damages which have accrued between completion date and date of termination. We believe the better view permits recovery of such accrued liquidated damages notwithstanding termination, as was done in such cases as *Continental Casualty Co.* v. *United States*, 113 F. (2d) 284 (C. C. A. 5), affirming 29 F. Supp. 598 (E. D. La.), certiorari denied, 311 U. S. 696; *United States* v. *Grogan*, 39 F. Supp. 819, 44 F. Supp. 871 (D. Mont.); 15 *Comp. Gen.* 409; *cf. Southern Pac. Co.* v. *Globe Indemnity Co.*, 21 F. (2d) 288 (C. C. A. 2).

that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
DAVID L. KREEGER,
Special Assistant to the Attorney General.
VALENTINE BROOKES,
HUBERT H. MARGOLIES,
Attorneys.

JUNE 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943

FILED
JUN 11 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1942.

No. 983.

JOHN M. WHELAN & SONS, INC.,
Petitioner,

v.

THE UNITED STATES.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GEORGE E. BEECHWOOD,
ROBERT G. KELLY,
CONLEN, LABRUM & BEECHWOOD,
Attorneys for Petitioner.

International, 236 Chestnut St., Philadelphia

TABLE OF CASES CITED.

	Page
Maryland Casualty Company v. United States, 93 C. Cls. 247	2
United States v. Cunningham, 125 F. (2d) 28	3

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1942.

No. 983.

JOHN M. WHELAN & SONS, INC.,
Petitioner,

v.

THE UNITED STATES.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The question as stated on page 3 of the respondent's brief is not, in our opinion, the question. The question is whether or not the Government in addition to the cost of completing the building should recover consequential and speculative damages and also liquidated damages, all of which the Court of Claims of the United States awarded (Items 1, 2, 3 and 4; Finding 8; R. 66, 67).

On page 6 of respondent's brief, it is stated:

> "The questioned items are 'excess costs' which Article 9 of the contract expressly stipulates shall be recovered in these circumstances."

The questioned items are not costs, but damages. Petitioner is complaining about the award of both liquidated and special damages.

The footnote of respondent's brief, page 6 thereof, states that no item of the award is liquidated damages. Item 4 in the wording of the Court below reads:

> "Damages accrued between November 30, 1934, completion date under plaintiff's contract and December 4, 1934, when plaintiff defaulted, calculated at the rate of $25.00 specified in the liquidated damage clause of Article 9 of the contract."

The Court below did award liquidated and consequential damages, as well as the costs of completing the buildings (Items 1, 2, 3 and 4; Finding 8; R. 66, 67).

On page 10, in the conclusion of its brief, the respondent states:

> "The decision below is correct and is in accord with previous decisions of the court below and of this court."

The accuracy of that statement is challenged. The decision of the Court of Claims definitely is not in accord with its previous decisions. As late as 1941 the Court of Claims of the United States in the decision in *Maryland Casualty Company v. United States,* 93 C. Cls. 247, expressly held that the Government could not recover both excess cost of completing the buildings and liquidated damages. The court stated at page 254:

> "Article IX gives the Government the choice of permitting the contractor to continue and collecting $35 per day as liquidated damages for delay, or of pursuing the other course by taking over and finishing the work, and collecting the excess costs incurred in the completion of the contract.
>
> "By its terms it does not give the Government the right to collect both.

> "The defendant having exercised its right to terminate the contract and to proceed with its completion, it thereby waived its claim to liquidated damages. *Fidelity Casualty Co. of New York v. United States,* 81 C. Cls. 495; *Commercial Casualty Insurance Co. v. United States,* 83 C. Cls. 367; *American Employer's Insurance Company of Boston v. United States,* 91 C. Cls. 231; *U. S. for Use and Benefit of General Lighterage Company v. Maryland Casualty Co.,* 25 Fed. Supp. 778."

And again at page 255:

> "The defendant had the right to terminate the contract at any time after November 24, 1936. It did not choose to do so until February 23, 1937. At that time it did exercise its choice, and having done so, was bound thereby. The defendant therefore is not entitled to charge the item of $3,185 as liquidated damages."

As recently as December of 1941, the United States Court of Appeals for the District of Columbia made the same ruling. The opinion was written by Chief Justice Groner and concurred in by Miller and Rutledge, JJ., (now Supreme Court Justice). The name of the case is *United States v. Cunningham,* 125 F. (2d) 28. In that case the Court was considering the identical article in a government contract, and the Court said that to interpret and apply it as the Government here contends would be

> ". . . not only to disregard the plain, unambiguous language of the Government's own contract, but to make a new and different contract for the parties, and this we have already said we may not do. The rule has always been that liability upon a contract such as this may be established only by strict compliance with its conditions." (P. 32.)

Chief Justice Groner in his discussion reviewed the previous rulings of the Court of Claims, which at that time had been uniform and were uniform up until the present decision. The court said at pages 31 and 32:

> "*Second.* The other item constituting the judgment was, as we have seen, for moneys unlawfully retained by the United States as liquidated damages for delay in completion. The deduction was made under Article 9, by the terms of which the contractor was required to prosecute the work to completion within the specified time, failing which the United States were given two rights—*one,* to take over the work and complete it and hold the contractor for any excess cost; *the other,* to permit the contractor to continue the work subject to the right of the United States to retain out of the contract price liquidated damages for each calendar day of delay until the work should be completed. We think these rights are alternative. The article states that if the Government does not terminate the right of the contractor to proceed, then the contractor shall continue the work and liquidated damages may be assessed.
>
> "But in this case the United States did terminate the contract and did take over and complete the work and did collect the excess costs. Having chosen this method of completing the contract, they cannot also claim the other alternative of liquidated damages. Simliar provisions in government contracts have been consistently so construed by the Court of Claims. See particularly, Fidelity & Casualty Co. of New York v. United States, 81 Ct. Cl. 495; Commercial Casualty Ins. Co. v. United States, 83 Ct. Cl. 367. In the first named case the Court of Claims said: 'The defendant elected to choose the first of these alternatives and when that decision was made the second alternative disappeared from the picture. It was thereafter mere

surplusage. Upon the termination of the contract no liquidated damages could be charged to or be recoverable from the contractor.' 81 Ct. Cl. page 502.

"The same conclusion was reached in United States v. Maryland Casualty Co., D. C., 25 F. Supp. 778, 780, where the court said: 'The Government protected itself under the contract in two different ways. It could take over the work and complete it, charging any extra cost and expense to contractors; or it could wait until the job should be completed by the contractors, then collect as liquidated damages the per diem amount agreed upon. It could not adopt both courses. The two methods are inconsistent. The Government has chosen the first one, taking the work out of the hands of the contractors who cannot now complete it.'

"This view was adhered to in American Employer's Ins. Co. v. United States, 91 Ct. Cl. 231, though in that case the contract was for several different buildings with different completion dates. Some had been fully completed when the contract was terminated by the government; others had not. As to the former the court applied the provision for liquidated damages, but allowed only excess costs as to the latter.

"The only case cited by the United States where liquidated damages and excess costs were both recovered under a contract such as we have here is Continental Casualty Co. v. United States, 5 Cir., 113 F. 2d 284, affirming D. C., 29 F. Supp. 598, certiorari denied, 311 U. S. 696, 61 S. Ct. 133, 85 L. Ed. 451. However, the question whether these are alternative rights was not mentioned in either the Circuit Court or the District Court opinion and does not appear to have been raised by the parties."

What the Government seeks is to recover damages from the contractor by reason of the Government's own delay.

The damages which the Court below allowed accrued during the period of time when the completion of the buildings and the control of the work were entirely within the hands of the Government. This contract cannot be read to give the Government the right which it now asserts unless the plain, unambiguous language of the contract is wholly disregarded and the previous decisions of the Court of Claims be overruled.

It is submitted that this Court should grant a certiorari.

Very respectfully submitted,

GEORGE E. BEECHWOOD,
ROBERT G. KELLY,
CONLEN, LABRUM & BEECHWOOD,
Attorneys for Petitioner.